United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1072

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

NO. 74-1072

JASPER ROBERSON,
PETITIONER-APPELLANT

vs.

CARL ROBINSON, WARDEN, CONNECTICUT CORRECTIONAL INSTITUTION, SOMERS,
RESPONDENT-APPELLEE

PETITIONER'S APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

RESPONDENT-APPELLEE'S BRIEF

To be argued by:

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ADDENDUM OF STATUTORY AND RULE PROVISIONS

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit court judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Sec. 613. Request for Finding; Draft Finding

In cases tried to the court, where a finding is necessary for the purposes of the appeal, the party appealing shall file, with his appeal, his request therefor, duly signed, stating distinctly the questions of law which he desires reviewed, and annex thereto a draft of such findings as he deems necessary to present these questions.

Sec. 622. Errors Which May Be Assigned

Error in the finding shall be assigned, directly, (a) in finding without evidence a material fact as specified in a designated paragraph of the finding, or is as to a part of a paragraph, as to such part as is quoted; (b) in refusing to find a material fact which was admitted or undisputed; or, (c) in finding a fact in language of doubtful meaning, so that its real significance may not clearly appear.

Sec. 696. Lack of Diligence in Prosecuting or Defending Appeal

If a party shall fail to prosecute an appeal or writ of error with proper diligence, this court may, on motion by any other party to the appeal or writ of error, or of its own motion, dismiss the appeal or writ of error with costs. If a party shall fail to defendant against an appeal or writ of error with proper diligence, this court may, on motion by any other party to the appeal or writ of error, or of its own motion, set aside in whole or in part, the judgment under attack, with costs, and direct the entry of an appropriate final judgment by the trial court against the party guilty of the failure. If that party is a defendant in the action, the directed judgment may be in the nature of a judg-

ment by default for such amount as may, upon a hearing in damages, be found to be due. If that party is a plaintiff in the action, the directed judgment may be one dismissing the action as to him, and said judgment shall operate as an adjudication upon the merits. The statutory provisions regarding the opening of judgments of nonsuit and by default shall not apply to a judgment directed under the provisions of this rule.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

NO. 74-1072

JASPER ROBERSON,
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vs.

CARL ROBINSON, WARDEN, CONNECTICUT CORRECTIONAL INSTITUTION, SOMERS,
RESPONDENT-APPELLEE

PETITIONER'S APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

RESPONDENT'S BRIEF

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Petitioner, whose probation had been revoked, had a federal constitutional right to remain at liberty pending an appeal from a criminal conviction which underlay the revocation of his probation?

2. Whether the Petitioner should be permitted to assert claims on appeal which he has not asserted before the District Court or the State Courts?

3. Whether the District Court properly dismissed the Petitioner's application for a writ of habeas corpus when the uncontroverted facts showed that state remedies had not been exhausted?

STATEMENT OF THE CASE

The Petitioner, a Connecticut prisoner, has appealed the dismissal of his petition for a writ of habeas corpus by the United States District Court for the District of Connecticut (Clarie, J.). However, the claims made on his appeal extend beyond Judge Clarie's ruling and encompass both past federal and past and present state litigation. For this reason, it seems best that the underlying litigation be reviewed in a chronological manner. Also, the Petitioner made no effort to secure a joint appendix. Rule 30, F.R. App. P. Therefore, references in the Respondent's brief to items in the Petitioner's appendix will bear the prefix "A"; while items contained in his own appendix will be identified by the prefix "B".

The Petitioner's first litigation which relates to the issues before this court occurred on January 9, 1970, when he was convicted, on a plea of guilty, to the possession or control of heroin in violation of Section 19-481(a) of the Connecticut Statutes. On that conviction, he received a suspended prison sentence of two to five years and probation for three years. (pp. A. 18, 19).

The Petitioner's next involvement with the courts of Connecticut were two prosecutions for robbery with violence. These charges were the subjects of one information but the two counts therein were tried separately at the Petitioner's request. (p. A. 22 par. 12; p. B. 1). On the first count, the Petitioner was convicted by a jury, on June 30, 1971, of the lesser felony of robbery and for this crime he received

a sentence, on July 9, 1971, of two to four years. (pp. A. 21, 22 pars. 9, 13, 14). The second count resulted in a jury verdict of guilty as charged on October 1, 1971. On October 8, 1971, a sentence of four to eight years was imposed for this count, to run concurrently with the two to four year sentence imposed the previous July. (p. A. 22 pars. 13, 14). Related to the Petitioner's two robbery offenses was the [state] petition for a writ of habeas corpus mentioned in the letter from his "state" counsel to the attorney representing him now. (p. A. 46). This petition contesting the validity of his arrest [on the robbery charges] was initiated after the Petitioner had pleaded not guilty to both counts of the information but before either of his trials. The opinion of the Superior Court dismissing the habeas petition is set forth in the Respondent's appendix at pp. B. 2-5. Also to dispel any interference which might arise from the language of "state" counsel's letter (p. A. 46) that the Petitioner did not have counsel for his [state] habeas petition, the front-piece of the transcript of that proceeding has been included in Respondent's appendix at p. B. 6.

After the Petitioner had been convicted and sentenced in July, 1971, on the first count of the robbery information, the state Department of Adult Probation decided to charge him as a violator of the probationary term imposed on the narcotics conviction in January of 1970. However, the hearing held on the probation violation charge, pursuant to sections 53a-32 and 53a-33 of the Connecticut Statutes, did not occur until October 8, 1971, after the defendant had been sentenced on his

second robbery conviction. (p. A. 22 par. 15). As a result of that hearing, the Superior Court revoked the Petitioner's probative and ordered that the two to five year [narcotics] sentence originally suspended on January 9, 1970, to be executed and served consecutively to the sentence imposed on the second count of the robbery information. (p. A. 23 pars. 20, 21).

When the Petitioner's probation violation was heard and determined on October 8, 1971, he already had appealed to the Connecticut Supreme Court from the judgment rendered July 9, 1971 on his first robbery conviction[1]. (p. A. 22 par. 15). Subsequently, he also appealed the order revoking his probation and the judgment on the second count of the robbery information. (pp. A. 20; A. 22 par. 15).

The Petitioner's appendix contains both a transcript of the probation revocation hearing (pp. A. 28-34) and the printed record before the Connecticut Supreme Court on his appeal from the revocation order (pp. A. 17-23). However, the Petitioner has not included the Probation Department's report, referred to in the transcript (pp. A. 31-32) and the [state] trial court's finding (pp. A. 21 pars. 6-9; A. 22 par. 10) as Exhibit A. The trial court's action in making the probation report a part of its finding, see p. A. 24 par. 22, was expressly noted by the Connecticut Supreme Court in its affirmance of the revocation order. (p. A. 39). So that the complete [state] appellate record will be before this court, a copy of the Probation Department's report is contained in the Respondent's appendix at pp. B. 7, 8.

The report (p. B.7,8) recited the Petitioner's placement on probation on January 9, 1970 and his arrest shortly afterward on January 18, 1970 for two offenses of robbery with violence one of which had occurred on January 13, 1970. The report then detailed the factual circumstances of the January 13 offense and the Petitioner's subsequent conviction and sentence albeit of the lesser crime of robbery. The finding and the transcript disclose that the Petitioner's "state" attorney had received a copy of the report a few weeks previously and at the hearing both he and the Petitioner examined it. (pp. A. 21 par. 7; A. 30, 31). When asked by the Court if he was familiar with the contents of the report, the Petitioner answered "yes" and when asked by the court as to whether he agreed with such contents, the Petitioner also answered "yes". (pp. A. 21 par. 8; A. 31). The only discrepancies which the Petitioner's "state" attorney claimed existed in the report were that the appeal from the conviction was not mentioned and that the jury could not have believed all of its factual allegations because their verdict was robbery rather than robbery with violence.

At the present time and before this court, a semblance of a claim appears, via a letter from Petitioner's "state" counsel (p. A. 44) that the Petitioner, at the revocation hearing, never admitted the criminal behavior on which the first robbery judgment was predicated. However, this belated contention of non-admission has never been pressed in any legal manner. The [state] trial court included in the facts found by it the Petitioner's agreement with the contents of the report. (p.

A. 21 par. 8). To correct this finding, state procedure requires that error be assigned that a fact was found either without evidence or in language of doubtful significance [2]. An examination of the defendant's assignment of error in the appeal from the revocation of the Petitioner's probation (p. A. 24) shows that no such claim was ever made. Neither was the conduct of the revocation hearing or the evidence adduced thereat the subject of the Petitioner's initial [federal] habeas petition which was dismissed by Judge Newman (pp. B. 9-17) nor his subsequent petition (pp. A. 41-42) the dismissal of which by Judge Clarie (pp. A. 1-8) is the basis of this appeal.

Of the Petitioner's three appeals to the Connecticut Supreme Court, the one concerning the revocation of his probation has been determined. State v. Roberson, 164 Conn. (34 Conn. L.J. No. 51, p. 1, June 19, 1973), _____ A.2d _____. The remaining two appeals from the Petitioner's criminal convictions are still pending and the Petitioner's present brief devotes much attention to the claimed effect of both of them. However, it is manifest from a reading of the trial court's finding (pp. A. 20-24) and the Connecticut Supreme Court's opinion (pp. A. 37-40) in the appeal already decided, as well as from the decisions in both of the Petitioner's federal habeas proceedings, that only the robbery conviction in July of 1971 was material to the probation revocation.

On May 29, 1973, before the Connecticut Supreme Court's decision was announced but effective on June 29, 1973, the State Parole Board paroled the Petitioner to his consecutive sentence, i.e. the one which was ordered executed when his probation was

revoked [3]. This administrative action apparently gave rise to a habeas claim in the District Court that the Petitioner's Fourteenth Amendment rights had been violated when the Connecticut Supreme Court ruled that his probation could be revoked on the basis of a criminal conviction which was then in the process of appeal. (pp. B.9-11). Judge Newman's decision, rendered without any participation by the State or its officials, (p. B. 18) properly construed the claim to be whether the Petitioner had a constitutional right to a suspension of the probation revocation pending a determination of the appeal of the conviction which caused it. (pp. B.15-17). The Petitioner then renewed the claim which Judge Newman had dismissed together with a new claim that he was being denied appellate review of the underlying conviction by the State's lack of diligence in a second habeas petition which, after the filing of a return, was dismissed by Judge Clarie. (pp. A. 1-11).

Aside from finding a lack of exhaustion of state remedies on the claim of lack of diligence by the State, Judge Clarie's opinion noted that in addition to the conviction, the Petitioner had admitted the behavior which accounted for it. As mentioned above, the Petitioner never attacked this admission in the state courts but concentrated solely on his view that a conviction being appealed could not suffice as a reason for probation revocation.

After Judge Clarie's decision, the Petitioner moved in the Connecticut Supreme Court for judgment on both his appeals claiming that the State had not been diligent in its defense [4]. That court (p. A. 43) granted the Petitioner's motion as to the first count which is the conviction related to the probation revocation unless the State filed its counterfinding before January 22, 1974

and denied it as to the second count. The State's counterfinding as to the first count was filed in compliance with the order. (p. B.19). Thereafter the Petitioner brought no further proceedings in the District Court. Instead he appealed from Judge Clarie's ruling and now makes three claims to this court: (1) his federal constitutional rights were violated when his probation was revoked because of a new criminal conviction which was being appealed and therefore he must be released; (2) his federa constitutional rights were violated because he was denied a speedy trial on one or both of the two counts of the information charging him with the crime of robbery with violence and therefore this court should order a dismissal of these convictions; and (3) his federal constitutional rights were violated either because of the State's delay in processing his appeal or because of the appellate procedures of the state Supreme Court and therefore he is entitled to a reversal of both criminal convictions.

ARGUMENT

I.

THE PETITIONER HAS NO FEDERAL CONSTITUTIONAL RIGHT TO REMAIN AT LIBERTY PENDING AN APPEAL FROM THE CONVICTION WHICH UNDERLAY THE REVOCATION OF HIS PROBATION

The universal standard employed to determine if error was committed on a revocation of probation is whether the hearing court abused its discretion. United States v. Nagelberg, (2d Cir. 1969), 413 F2d 708, 710 cert. denied 396 U.S. 1010, 90 S.Ct. 569; United States v. Markovich, (2d Cir. 1965), 348 F2d 238, 241; United States v. Crocker, (8th Cir. 1971), 435 F2d 601, 604; Hamilton v. United States, (10th Cir. 1955), 219 F2d 364, 366. At least this is so in a situation such as is presented here where

no claim of due process denial at the revocation hearing was made, c.f. Gagnon v. Scarpelli, _____ U.S. _____, 93 S.Ct. 1756 (1973); United States ex rel Bey v. Connecticut State Board of Parole, (2d Cir. 1971), 443 F2d 1079 and there is no question that the revocation order was based on a violation of a valid condition of probation. c.f. United States v. Chapel, (9th Cir. 1970), 428 F2d 472, 474; Hyland v. Procunier, (N.D. Calif. 1970) 311 FSupp 749, 750.

In the present case, Judge Clarie's opinion (p. A. 6) notes that the Petitioner's revocation rested on two bases - i.e. his conviction of a crime while on probation and his admission of the conduct which led to the conviction, each of which was a sufficient foundation for the exercise of the state court's discretion. United States v. Markovich, supra; United States v. Garza, (5th Cir. 1973), 484 F2d 88; United States v. Carrion, (9th Cir. 1972), 457 F2d 808. No disagreement is expressed by the Petitioner with the proposition that a revocation of probation may result from a subsequent conviction or from proof of subsequent criminal conduct without such a conviction. (Petitioner's brief p. 19).

The Petitioner's disagreement with Judge Clarie's ruling seems to be limited to the contention that the state proceedings must be construed to read that his probation was revoked solely because of his conviction for robbery in July of 1970. Two explanations are offered for the importance of this distinction. The first claim is based on the Petitioner's argument that because the conviction had been appealed at the time his probation was revoked, the Eighth Amendment accorded him the right to bail pending

appellate review of the conviction notwithstanding the subsequent revocation of probation. The second claim as expressed in the Petitioner's brief (p. 16) is that "although probation can be revoked without a conviction or on a conviction alone, once an appeal is taken . . . the Constitution then prohibits revocation before the petitioner's direct appellate rights are exhausted". On these reasonings, he maintains that his present incarceration is illegal.

The argument that the Eighth Amendment secures a right to bail for one convicted of a crime, irrespective of whether the conviction is used as a basis for the revocation of previously imposed probationary status is patently frivolous. The constitutional right to bail is coupled with the presumption of innocence and refers to pre-conviction situations. Stack v. Boyle, 342 U.S. 1, 4, 72 S.Ct. 1, 3 (1957). Specifically, the Eighth Amendment does not guarantee a right to bail even pending a probation revocation hearing. In Re Whitney, (1st Cir. 1970) 421 F2d 337, 338. Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525 (1952) cited on page 19 of the Petitioner's brief provides no authority for his position.

The Petitioner's second claim is the more cogent because his appeal from the revocation of his probation has already been decided whereas his appeal from the robbery conviction is still pending. As the Connecticut Supreme Court noted (p. A. 39) where a revocation of probation is based on a subsequent conviction, alone, a successful appeal from that conviction would operate as a withdrawal of the probation revocation. See cases such as People v. Lynn, (Cal. App. 1969), 76 Cal.Rptr. 801, 803; State

ex rel Roberts v. Cochran, (Fla. App. 1962), 140 So.2d 597, 599. Otherwise, the distinction of whether or not the Petitioner's probation was revoked solely on the basis of his subsequent conviction would be of no importance to the question of the legality of his present detention. However, a decision on this point is unnecessary to sustain Judge Clarie's ruling. Even where a conviction is the basis of a revocation of probation, an appeal of that conviction does not operate as a stay of the revocation order. United States v. Garza, supra; United States v. Ambrose, (6th Cir. 1973), 483 F2d 742, 743; State v. Hill, 206 N.C. 107, 145 S.E.2d 349, 351 (1965); People v. Lynn, supra; State v. Spicer, (Or App. 1970), 471 P2d 865; State ex rel Roberts v. Cochran, supra.

Because of the nature of the Petitioner's argument, some further mention of Judge Clarie's opinion that the revocation rested on two sufficient bases is merited here although such of necessity also relates to the "delay" claim discussed infra. Before the Supreme Court of Connecticut, the Petitioner claimed that his probation could not be revoked because the July 1970 conviction was on appeal when the revocation order was entered. (p. A. 39). Although this differs somewhat from his present stance, he has in both instances relied for his position on the revocation procedure prevalent in the State of Texas. There proof of a conviction which is being appealed apparently is not sufficient to establish a breach of the probationary condition that the defendant not violate the law. In most instances, Texas courts seem to require an independent inquiry and finding regarding the conduct underlying the conviction. E.g. Kelly v. State, (Tex. Cr. App. 1972), 483 S.W.2d 467, 470; Jansson v. State, (Tex. Cr. App.

1971), 473 S.W.2d 40, 42; Hulsey v. State, (Tex. Cr. App. 1969) 447 S.W.2d 165, 166; Harris v. State, (Tex. Cr. App. 1960), 331 S.W.2d 941. But even under the Texas rule, no independent inquiry or finding is required where a defendant, as the Petitioner did here, agrees with the allegations being urged as the grounds for the revocation of his probation. Cannon v. State, (Tex. Cr. App. 1972), 479 S.W.2d 317.

It would require the most strained reading of the Connecticut Supreme Court's opinion to disagree with Judge Clarie's holding. Under Connecticut's appellate procedure, a trial court's conclusions are to be read with and tested by the facts which it has found. Johnson Jewels, Ltd. v. Leonard, 156 Conn. 75, 79, 239 A2d 500 (1968) In this case, the trial court's conclusion that the Petitioner violated a condition of his probation on being convicted of a crime must be read in connection with its undisputed findings of fact that he admitted the behavior which constituted the crime as well as the conviction all as detailed in the Probation Department's report. No extrinsic evidence of the conviction was introduced. Parenthetically, the Petitioner's admission encompassed all of the elements of the crime of robbery with violence, State v. Velicka , 143 Conn. 368, 371, 122 A2d 739 (1956) although as stated before, the conviction was for the lesser offense of robbery.

II.

THE PETITIONER NOT HAVING RAISED HIS SPEEDY TRIAL CLAIM IN THE DISTRICT COURT OR THE STATE COURTS CANNOT APPROPRIATELY RAISE IT ON THIS APPEAL

The record in this case makes it evident that the Petitioner never claimed he was denied a speedy trial as to the criminal charges against him in the District Court. Neither did he raise

this claim in the state courts as is shown by his requests for finding [5] on his appeals from both these convictions. (pp. B. 20-22). Therefore, it cannot be appropriately raised for the first time before this court. Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971); United States ex rel Ferrari v. Henderson, (2d Cir. 1973) 474 F2d 510, 514.

III.

THE PETITIONER'S CLAIM CONCERNING DELAY IN THE PROCESSING OF HIS CRIMINAL APPEALS, AS PRESENTED TO THE DISTRICT COURT, WAS PROPERLY DISMISSED AND HIS CLAIM CONCERNING CONSTITUTIONAL INFORMITIES IN STATE'S APPELLATE PROCESS IS BEING PRESENTED FOR THE FIRST TIME TO THIS COURT

Finally, the Petitioner has mounted a two-pronged attack relating to the status of his criminal appeals which may be characterized as delays peculiar to his own appeals and delays inherent in the State's appellate process. Only the first claim was presented to the District Court where Judge Clarie ruled the Petitioner had failed to exhaust state remedies (pp. A. 4, 8, 11).

The Respondent does not dispute that the provisions of 28 U.S.C. §2254(b) and (c) embody a rule of comity. But in defining the obligations of federal courts under this rule, the Supreme Court has said that the federal habeas applicant is required to present the state courts with the same claim that he urges on the federal courts. It is not sufficient merely that he has been through the state courts. Picard v. Connor, supra. Here the threshold issue before the District Court and one which was not contested when the Petitioner presented his habeas petition was that he had not availed himself of the existing State remedy of moving for judgment on his pending appeals because of the State's lack of diligence in defending them. Connecticut Practice

Book §696. Under these circumstances, where the Respondent raised the exhaustion question, the petition was properly dismissed. United States ex rel Griffin v. Martin, (2d Cir. 1969), 409 F2d 1300, 1302. Compare West v. Louisiana, (5th Cir. 1973) 478 F2d 1026, 1034. The efficacy of the state procedure is shown by the order which the Connecticut Supreme Court entered as to the judgment on the first count of the information subsequent to Judge Clarie's dismissal. See pp. A. 25, 27, 43. While the Petitioner's dissatisfaction with the Connecticut Supreme Court's order is obvious, an appeal from Judge Clarie's earlier dismissal is hardly the proper manner in which to raise it. Aside from the threshold question is the underlying factual situation of this case which shows that the pendency of the Petitioner' criminal appeals do not affect the legality of his current detention, the very issue which federal habeas corpus is designed to test. See Preiser v. Rodriguez, _____ U.S. _____, 93 S.Ct. 1827, 1833 (1973); Walker v. Wainwright, 399 U.S. 335, 336, 88 S.Ct. 962, 963 (1968) reh. denied 390 U.S. 1036, 88 S.Ct. 1420. However, even if, as the Petitioner seems to contend, the conviction on the first count is relevant to his incarceration as a probation violator, that appeal is moving forward.As stated recently by the First Circuit, "We cannot too strongly condemn the practice of proceeding with post trial relief in two courts simultaneously, except in the unusual circumstance that the state court proceeding is not going ahead". Nelson v. Moriarty, 484 F2d 1034, 1036 (1973).

The Petitioner's final claim is that his criminal appeals have been delayed by the very nature of the state appellate process. The authority of the Connecticut Supreme Court to promulgate rules of procedure lies in its inherent authority under the state Con-

stitution. LaReau v. Reincke, 158 Conn. 486, 492, 264 A2d 576 (1969). While the Respondent has doubts as to whether a claim of this nature is a proper subject for a habeas petition, as distinguished from more formal procedures [6], these doubts do not require present resolution. This claim was never made to the District Court. The references previously made to Picard v. Connor and United States ex rel Ferrari v. Henderson would be equally applicable here.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted

Carl Robinson, Warden, Connecticut Correctional Institution, Somers

BY: Jerrold H Barnett

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NEW HAVEN, CONNECTICUT 06525

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing brief, including the appendix were sent via U.S. mails, postage prepaid to Henry Mark Holzer, Esq., attorney for the Petitioner, c/o Brooklyn Law School, 250 Joralemon Street, Brooklyn, New York 11201 on the 12th day of April, 1974.

Jerrold H Barnett
JERROLD H. BARNETT

FOOTNOTES

1 The appeal was entered on July 12, 1971 at which time the Petitioner's attorney was appointed special public defender.

2 Connecticut Practice Book §622.

3 The authority of the Connecticut Board of Parole is derived from §54-125 of the General Statutes. Its authority to parole to a consecutive sentence is contained in an opinion dated October 12, 1971 from the Attorney General of Connecticut to the Chairman of the Board of Parole which opinion is reproduced in the appendix.

4 Connecticut Practice Book §696.

5 Connecticut Practice Book §613.

6 The doubts are raised by the concurring opinion of Mr. Justice Powell in Schneckloth v. Bustamente, _____ U.S. _____, 93 S.Ct. _____, 36 L.Ed. 2d at 876 in which the Chief Justice and Mr. Justice Rehnquist joined and in which Mr. Justice Blackman approved.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

NO. 74-1072

JASPER ROBERSON,
PETITIONER-APPELLANT

vs.

CARL ROBINSON, CONNECTICUT CORRECTIONAL INSTITUTION, SOMERS,
RESPONDENT-APPELLEE

APPENDIX TO RESPONDENT'S BRIEF

I N D E X

NO. 16787

STATE OF CONNECTICUT	)	SUPERIOR COURT
	)	
v.	)	AT NEW HAVEN
	)	
JASPER ROBERSON	)	January 27, 1971

MOTION TO SEVER

The defendant moves that the counts on the within information be severed and that he be tried separately on each. In support of this motion the defendant represents that the State appears to be alleging offenses as to which there will be little or no overlapping evidence. Therefore, joint trial of the separate counts would result in no economy but, conversely, would substantially prejudice the defendant.

THE DEFENDANT

BY: John R. Williams
His Attorney

O R D E R

The foregoing motion having been heard, the relief therein requested is hereby GRANTED.

THE COURT Healy

BY: _____, J.
Asst Clerk

B1

Service certified in accordance

NO. 16787

STATE OF CONNECTICUT	:	SUPERIOR COURT
v.	:	NEW HAVEN COUNTY
JASPER ROBERSON	:	DECEMBER 15, 1970

MEMORANDUM ON HABEAS CORPUS

The petitioner for a writ of Habeas Corpus bases his action on an arrest without a warrant, while the petitioner was not in the act of committing a felony or misdemeanor, that the arrest was not made as the result of speedy information, and that his identification in the court room was a violation of his constitutional rights. The petitioner was arrested January 18, 1970 on a charge of robbery with violence, was bound over to the Superior Court and there entered pleas of not guilty to two counts of robbery with violence, those pleas being entered June 23, 1970 and July 22, 1970. It is the state's claim that having entered a plea to each count the petitioner has waived his rights to challenge the legality of his arrest.

"Under modern criminal procedure, the failure to raise a claim of lack of jurisdiction of the person until after the entry of a plea of guilty or not guilty is strong evidence of a consent to the jurisdiction of the person or, to use the language of Church v. Pearne, 75 Conn. 350, 355, 53 A. 955, of a 'voluntary submission' to the jurisdiction of the court over the person. An analogous rule applies in civil cases. Beardsley v. Beardsley, 144 Conn. 725, 730, 137 A.2d 752. Under § 468 of the Practice

Book the procedure in civil cases is made applicable, insofar as adaptable, to criminal cases. Pleadings in civil cases are to be filed as set forth in §§ 74 and 75 of the Practice Book. From this it follows that any preliminary motion in a criminal case should be filed prior to a plea of guilty or not guilty, unless the grounds for the motion are not then known to, or reasonably ascertainable by, the accused." State v. Licari, 153 Conn. 127, 130.

"As we pointed out in State v. Licari, supra, our procedure in civil cases requiring preliminary matters to be disposed of before issue is joined applies, so far as adaptable, to criminal cases. Practice Book § 468. Consequently, it is necessary to raise a claim of lack of jurisdiction of the person prior to a plea on the merits if a waiver of any claimed illegality or a voluntary submission to the jurisdiction is to be avoided. . . . It is the proper presentment of the information - not the arrest which is essential to initiate a criminal proceeding. Tracy v. Williams, 4 Conn. 107, 112. Arrest and detention are primarily for security purposes and not for the purpose of conferring jurisdiction. See Pelak v. Karpa, 146 Conn. 370, 372, 151 A.2d 333; Copes v. Malacarne, 118 Conn. 304, 306, 172 A.89. The affidavit now required by the Licari case pursuant to the rule in cases such as Giordenello v. United States, 357 U.S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503, serves only to furnish the basis for the application for the warrant. It does not affect the validity of the information so far as the information properly charges an offense. And an arrest under the authority of an illegal warrant does not affect the jurisdiction of the trial court when no timely objecti

is made and the information to which the accused is called upon to answer is valid. Albrecht v. United States, 273 U.S. 1, 8, 47 S. Ct. 250, 71 L. Ed. 505. The court's jurisdiction rests, not on the legality of the arrest warrant, but on the court's legal cognizance of the subject matter, that is, the offense, and of the person of the alleged offender. 21 Am. Jur. 2d, Criminal Law, § 378. Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong. Case v. Bush, 93 Conn. 550, 552, 106 A. 822. It is a matter of law and can be neither waived nor conferred by consent of the accused. Jurisdiction of the person may, on the other hand, be acquired by consent of the accused or by waiver of objection, and it is waived by pleading not guilty and going to trial. Albrecht v. United States, supra; 21 Am. Jur. 2d. Criminal Law, § 379. If the court has jurisdiction of the subject matter, as it had in the present case, the rule is generally recognized that, if an accused person is physically before the court on a proper accusatory pleading, any invalidity in his original arrest is immaterial. United States ex rel. Langer v. Ragen, 237 F.2d 827, 829 (7th Cir.); Commonwealth v. Gorman, 288 Mass. 294, 300, 192 N.E. 618, note, 96 A.L.R. 982; Henderson v. Maxwell, 176 Ohio St. 187, 198 N.E. 2d 456; In re Davis v. Rhay, 68 Wash. 2d 496, 499, 413 P.2d 654; State v. Green, 244 La. 80, 89, 150 So.2d 571; 22 C.J.S. 382, Criminal Law, § 144." Reed v. Reincke, 155 Conn. 591, 597, 598, 599.

"To epitomize the rule, an illegal arrest does not merit habeas corpus relief. See Pappillon v. Beto, 257 F. Supp. 502, (S.D. Tex. 1966)." United States Ex Rel Orsini v. Reincke, 286 F. Supp. 974, 978. "A writ of Habeas Corpus is not like an action to recover damages for an unlawful arrest or commitment,

but its object is to ascertain whether the prisoner can lawfully be detained in custody and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment". United States Ex Rel Orsini v. Reincke, supra 978.

The petitioner having entered his plea of not guilty to the crimes with which he stands charged has waived his rights to challenge the legality of his arrest insofar as the jurisdiction of the court is concerned and for the further reason that habeas corpus is not warranted for an alleged illegal arrest, and the petition should be denied.

Petition denied.

Levine ,J.

IN RE: APPLICATION OF	:	SUPERIOR COURT
	:	
JASPER ROBERSON	:	NEW HAVEN COUNTY
	:	
FOR WRIT OF HABEAS CORPUS	:	NOVEMBER 19, 1970

B E F O R E

HON. IRVING LEVINE, J.

APPEARANCES:

GERALD P. DWYER, ESQ.
Counsel for Applicant

JERROLD H. BARNETT, ESQ.

Counsel for Respondent Warden

David Tilewick
Court Reporter

STATE OF CONNECTICUT
DEPARTMENT OF ADULT PROBATION

State No. 3-6-4529-S *Docket No.* 16039

PERIODIC PROGRESS REPORT

Probation Department Superior *Court*

Submitted by Lawrence Dragunoff
Probation Officer

Judge Otto H. LaMacchia *County or City of* New Haven

Court Name	*Real Name*	*Alias or Nickname*
Roberson, Jasper	Roberson, Jasper	(Robinson, Jap)

Offense Violation State Narcotic & Drug Act, 19-481(a)

Date October 15, 1971 *

REPORT OF VIOLATION

On January 9, 1970, New Haven County Superior Court, Judge Otto H. LaMacchia sentenced Roberson to the State Prison for a term of 2-5 years, execution suspended, and placed him on probation for a period of 3 years on the above charge.

Shortly thereafter, on January 18, 1970, he was arrested in New Haven on 2 counts of Robbery With Violence. This offense had taken place on January 13, 1970, four days after he was placed on probation by the Court. Following is a copy of the offense:

"At approximately 3:20 p.m. on January 13, 1970, this defendant entered Ben's Liquor Store located at 246 Newhall Street in New Haven, Conn. and purchased one pint bottle of Thunderbird wine. He then left the premises only to return within ten minutes, asking the proprietor, Mr. John Budd, if he would give him another pint of wine

*This date appeared on the probation report considered by the Superior Court on October 8, 1971 and this report had been delivered to the Petitioner's counsel some weeks prior to that date. The date as appears on the report is obviously erroneous. No question was ever raised as to the date in the state proceedings.

because he had taken all his money on the previous purchase. Mr. Budd advised the defendant that he would not be able to do so, at which point the defendant took another bottle of Thunderbird wine and smashed the same on the Coca Cola cooler. He then threatened Mr. Budd with the broken bottle and demanded all of Mr. Budd's money. Mr. Budd turned over to the defendant approximately $40.00 in bills and one roll of pennies. The defendant then fled from the scene.

The defendant was subsequently positively identified by Mr. Budd and arrested on the charge of robbery with violence."

Roberson was held in jail in lieu of bond from the time of his arrest until he was sentenced on June 9, 1971. He was found guilty by a jury in the New Haven County Superior Court on the charge of Robbery. He was sentenced by Judge Leo Parskey on July 9, 1971, to the State Prison for a term of 2-4 years.

Roberson is presently an inmate at the Connecticut State Prison. There is also pending against him at this time another count of Robbery With Violence which took place on another date than the one that he was found guilty of.

We, at this time, are returning the matter to the Court for further disposition.

Respectfully Submitted,
LAWRENCE DRAGUNOFF
Senior Probation Officer

LD/sg

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PETITION FOR A WRIT OF HABEAS CORPUS
(By a person is State custedy)

Full name of Petitioner

JASPER ROBERSON,

vs

Civil No. H 165
To be supplied by Clerk

CARL ROBINSON, WARDEN,
Nane of Respondent

1. Place of detention. **Connecticut State Prison.**

2. Name and location of the court which imposed sentence.
Superior Court, In and for the County of New Haven, Connecticut.

3. Case number or numbers in court where sentenced.
16039

4. The offense or offenses for which sentence was imposed.
Violation of Probation on Narcotics charge (possession).

5. Date and terms of sentence or sentences.
Probation imposed Jan. 9, 1970, resentenced Oct. 8, 1971. 2-5 Yr

6. Was a finding of guilty made? (Check one)
   - (X) After a plea of guilty?
   - (b) After a plea of nolo contendere?
   - (c) After a trial by a judge?
   - (d) After a trial by a judge and jury?

7. Did you appeal from the judgment of conviction or sentence imposed? If you answered yes, then: **YES**

   (a) To what court or courts did you appeal?
   Connecticut Supreme Court.

   (b) State the decision or decisions of the court or courts to which you appealed. **Denied.**

   (c) If you know, give the date of each decision and a copy or citation of each. **Reported Conn. Law Journal dated: June 19, 19**

8. If you did not appeal from your conviction and sentence or sentences why did you not do so?

PETITIONER PRAYS THE COURT WILL APPOINT AS "SPECIAL ATTORNEY" MR. JOHN R. WILLIAMS, 265 CHURCH STREET, NEW HAVEN, CONN., TO REPRESENT HIS INTERESTS IN THIS MATTER. MR. WILLIAMS IS FULLY AWARE OF ALL FACTORS IN THIS CASE, HAVING REPRESENTED PETITIONER IN THE STATE COURTS.

9. Now state simply and briefly why you believe that you are unlawfully in custedy. Be sure and give all facts which support your reasons.

REPLY TO THIS QUESTION ADDED ON EXTRA PAGE ATTACHED HERETO:

10. Before filing this petition have you filed in any State or Federal court any petition for a writ of habeas corpus or for any other relief? NO.

(a) If you have, name the court or courts and the results of your filing those petitions or motions.

(b) On what ground or grounds did you seek relief in those petitions or motions?

(c) If the ground or grounds in those motions or petitions did not include the grounds you set forth in this petition, why did you not set forth these grounds?

11. Were you represented by an attorney or attorneys at any time during the course of the proceedings against you? YES.

(a) Name and give the address of such attorney or attorneys, if any, and state at what stage of the proceedings he or they represented you.

During all proceedings in State Courts: Mr. John R. Williams, 265 Church Street, New Haven, Conn.

12. Have you read the instructions furnished with this petition and checked all of the answers and statements made in this petition? YES.

Signature of Petitioner

REPLY TO QUESTION #9.

While on probation on the matter under attack herein, your Petitioner was arrested and allegedly charged with new criminal offenses. After a trial by jury of twelve, your Petitioner was convicted and sentenced under the new offenses, the matter is presently under "appeal" in the State's Supreme Court of Connecticut. Petitioner's probation was revoked due to the new conviction and sentence imposed.

The sole legal argument being raised here is:
Did the Supreme Court of Connecticut deny your Petitioner "due process of law" in violation of the FOURTEENTH AMENDMENT to the United States Constitution by having permitted his probation to be revoked on the mere finding of conviction of crime "when that conviction is still under appeal?"

State of Connecticut)
County of Tolland) ss Somers

JASPER ROBERSON, being first duly sworn, states that he
Name of Petitioner
has signed the foregoing petition and that the information therein is true and correct to the best of his knowledge and belief.

Jasper Roberson
Signature of Petitioner

Subscribed and sworn to before me this 30 day of July, 1973

Adolph M. Toomey
Notary Public

MY COMMISSION EXPIRES MARCH 31, 1978

(Approved by the court February 1, 1965)

D.C.:C-2-b

H-165

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
JASPER ROBERSON VS CARL ROBINSON, WARDEN	For plaintiff: PRO SE Box 100 Somers, Conn. For defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed	Clerk					
J.S. 6 mailed	Marshal					
Basis of Action: Seeks to b e a liberty pending his appeal; alleges violation of his rights to due process of law	Docket fee					
	Witness fees					
Action arose at:	Depositions					

B13

H 165

D 1973	PROCEEDINGS	Date Orde Judgment N
9/13	1. Petition for a writ of habeas corpus filed. MEMORANDUM OF DECISION, FILED Newman, J. m 9/17/73 . Papers may be filed without fee. Copies mailed to petitioner and Attorney General Killian.	
10-31	2. JUDGMENT entered. Markowski, C. m Copies mailed to counsel.	

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JASPER ROBERSON :

V. : CIVIL NO. H 165

CARL ROBINSON, WARDEN :

MEMORANDUM OF DECISION

The petitioner, presently incarcerated at the Connecticut Correctional Institution, Somers, alleges that the revocation on October 8, 1971, of a sentence of probation he was serving violated his right to due process of law inasmuch as the conviction which was the basis for the revocation was on appeal at the time probation was revoked. Having duly exhausted his state judicial remedies, State v. Roberson, Conn. Law Journal, June 19, 1973, p. 1 (Supreme Court, April 1973), he seeks federal habeas corpus relief.

In December, 1969, petitioner was found guilty, in the Connecticut Superior Court, of possession or control of heroin, and on January 9, 1970, a sentence was imposed of not less than two nor more than five years in state prison; execution of the sentence was suspended, and the petitioner was placed on probation for three years. On June 30, 1971, while on probation, petitioner was found guilty of the crime of robbery, and on October 1, 1971, he was found guilty of still another crime, robbery with violence. Following a

hearing, the sufficiency of which petitioner does not challenge, a Superior Court judge revoked petitioner's probation and ordered that the sentence of January 9, 1970, be executed. As the sole ground for its decision, the Court stated, the "defendant has violated the terms of his probation included in the sentence imposed on January 9, 1970, upon being convicted of a crime." State v. Roberson, supra, at 2. The Court did not specify which of the two convictions it relied upon.

At the time of the hearing concerning the revocation of probation, the judgment on the June 30, 1971, conviction had been appealed and the judgment on the October 1, 1971, conviction was about to be. Petitioner challenges the constitutionality of a probation revocation order predicated upon such a non-final judgment of conviction.

In ruling on petitioner's appeal from the revocation of probation, the Connecticut Supreme Court noted that under Connecticut law, where revocation is based exclusively on the fact of conviction, the revocation must be withdrawn if the conviction is reversed. Id. at 3. Thus, this case does not present the issue of whether probation may be permanently revoked and a previously suspended sentence imposed because of a subsequent conviction that might be reversed on appeal. All that is at issue here is whether petitioner possesses a federally protected right to a suspension of the revocation order during the pendency of his appeal from the conviction

that triggered the revocation. In other words, he wants to be at liberty pending that appeal. No such federal right exists. It is well within the discretion of state judicial authorities to determine that convicted defendants whose probation has been revoked because of a subsequent conviction should not be released pending appeal.

Accordingly, the papers may be filed without fee, and the petition is dismissed.

Dated at New Haven, Connecticut, this 13 day of September, 1973.

Jon O. Newman

Jon O. Newman
United States District Judge

STATE OF CONNECTICUT

ROBERT K. KILLIAN
ATTORNEY GENERAL

ATTORNEY GENERAL'S OFFICE
30 TRINITY STREET
HARTFORD

September 27, 1973

The Honorable Arnold Markle
State's Attorney
State's Attorneys Office
121 Elm Street
New Haven, Connecticut

RE: Jasper Robertson v. State of Connecticut
Civil No. H-180

Dear Mr. Markle:

I am enclosing herewith an Order to File Answer on or before October 5, 1973, together with the Pro Se Complaint in the above-captioned case.

I am forwarding these to your office in view of the fact that the claims made therein are directed toward criminal matters handled in your office rather than with the conduct of the Department of Corrections.

I am also enclosing a copy of Judge Newman's Memorandum of Decision in Jasper Roberson v. Warden Robinson, Civil No. H-165, which apparently dismissed a similar Pro Se Complaint by Robinson. This dismissal was taken by the Court without any service or participation by this office.

Very truly yours,

ROBERT K. KILLIAN,
ATTORNEY GENERAL

Stephen J. O'Neill
Assistant Attorney General

SJO'N/pcv

Encls.

STATE OF CONNECTICUT
Supreme Court
AND
Superior Court
IN AND FOR NEW HAVEN COUNTY

RECEIVED
APR 3 8 29 AM '74

HAROLD J. IVEY
DEPUTY COURT ADMINISTRATOR
AND CLERK
ASSISTANT CLERKS
VINCENT J. FASANO
LEONARD J. GILHULY
JOHN J. MANNION
DAVID C. BRISTOL
~~SALVATORE L. DIGLIO~~
Carl E. Testo

OFFICE OF THE DEPUTY COURT
ADMINISTRATOR AND CLERK
NEW HAVEN

April 2, 1974

Jerrold H. Barnett
Deputy Chief State's Attorney
8 Lunar Drive
Woodbridge, Connecticut 06525

Dear Mr. Barnett: Re: #16787 State vs. Jasper Roberson

Please be advised that the Request for Finding on the appeal of the 1st count was filed in this office on August 10, 1973, the Counter Finding was filed on January 14, 1974, the Finding was filed on March 5, 1974 and the Assignment of Errors was filed on March 8, 1974, in the above entitled action. The Assignment of Errors was acted on by Parskey, J. on March 13, 1974.

Very truly yours,

Harold J. Ivey
Clerk

I/C

REQUEST FOR FINDING

The appellant in the above-entitled case requests a finding of the facts for an appeal to the Supreme Court regarding the Second Count of the Information, and submits the draft finding hereto annexed.

The questions of law which he desires to have reviewed are:

1. Did the Court err in the rulings upon evidence stated in Paragraphs 75 and 76 of the Draft Finding hereto annexed?

2. Did the Court err in the rulings upon motions stated in Paragraphs 77 and 78 of the Draft Finding hereto annexed, and in denying his Motion to Set Aside the Verdict and Judgment and his Motion in Arrest of Judgment, as stated in Part Sixth of the Draft Finding hereto annexed?

3. Did the Court err in charging the jury as stated in Paragraphs 79 through 186 of the Draft Finding hereto annexed?

4. Did the Court err in denying the defendant's motion to excuse jurors for cause, as stated in Paragraph 187 of the Draft Finding hereto annexed?

THE DEFENDANT

BY: _____
John R. Williams
Special Public Defender
His Attorney

REQUEST FOR SPECIAL FINDING

The appellant in the above-entitled case requests a special finding of the facts for an appeal to the Supreme Court regarding the Second Count of the Information, and submits the special draft finding hereto annexed.

The questions of law which he desires to have reviewed are:

1. Did the Court err in concluding that the manner in which the defendant's confession was obtained in this case did not violate any of the defendant's rights under the United States Constitution, the Connecticut Constitution, or the Connecticut General Statutes, as stated in Paragraph 43 of the Special Draft Finding hereto annexed?

2. Did the Court err in denying the defendant's motion to suppress confession, as stated in Paragraph 44 of the Special Draft Finding hereto annexed?

THE DEFENDANT

BY: _____
John R. Williams
Special Public Defender
His Attorney

The appellant in the above-entitled case requests findings of the facts for an appeal to the Supreme Court regarding the First Count of the Information, and submits the draft findings hereto annexed.

The questions of law which he desires to have reviewed are:

1. Did the Court err in charging the jury in the manner stated in Paragraphs 88 through 120 of the Draft Finding hereto annexed?

2. Did the Court err in imposing in advance of questioning an arbitrary time limit upon the voir dire examination, as stated in Paragraphs 121 through 123 of the Draft Finding hereto annexed?

3. Did the Court err in denying his challenge to the array and challenge for cause of the entire jury panel, as stated in Paragraphs 122 and 123 of the Draft Finding hereto annexed?

4. Did the Court err in denying his challenge for cause of the juror Lawson as stated in Paragraph 123 of the Draft Finding hereto annexed?

5. Did the Court err in denying portions of his motion for discovery and inspection, as stated in Paragraph 124 of the Draft Finding hereto annexed?

6. Did the Court err in failing to require the State to call as a witness or disclose to him or to the Court the identity of the informer who the State alleged was an eye-witness to the crime here charged, as stated in Paragraphs 124 through 132 of the Draft Finding hereto annexed?

7. Did the Court err in making the rulings upon evidence stated in Paragraph 133 of the Draft Finding hereto annexed?

THE DEFENDANT

BY: _____
John R. Williams
Special Public Defender
His Attorney

October 12, 1971

J. Bernard Gates,
Chairman
Board of Parole
340 Capitol Avenue
Hartford, Connecticut

Dear Mr. Gates:

You have requested our advice as to whether or not the Board of Parole has the authority to parole a person to a consecutive sentence.

By way of illustrating the problem with which you are concerned, we have been referred to a man who has been sentenced to two separate terms, the second of which, according to his mittimus, is to be served consecutively to the first. His first sentence is for a term of not less than four years nor more than nine years. His second sentence is for a term of not less than one year nor more than three years.

This man has served the minimum term of his first sentence. You point out to us that if the Board is without authority to consider paroling this man to his second sentence then one result of this second sentence would be to require him to be confined for the entire maximum term of his first sentence (nine years less good time) and then for the minimum term of his second sentence (one year less good time) before he can become eligible for parole.

Section 54-125, General Statutes provides, in part, that:

> "Any person confined in the Connecticut Correctional Institution, Somers, or the maximum security division of the Connecticut Correctional Institution, Niantic, for an indeterminate sentence, after having been in confinement under such sentence for not less than the minimum term, or, if sentenced for life, after having been in confinement under such sentence for not less than twenty-five years, less such time, not exceeding a total of five years, as may have been earned under the provisions of section 18-7, may be allowed to go at large on parole in the discretion of a quorum of the board of parole, ..."

If the Board does not have authority to parole a person to a consecutive sentence, then one consequence of such a sentence would be the elimination of the

availability of parole on the inmate's first sentence which availability is conferred by the above-quoted provisions of Section 54-125. Further, as noted above, this would mean that in a consecutive sentence situation, a person would have to serve his entire first sentence, less good time, and then the minimum term, less good time, of his second sentence before he would be eligible for parole.

We are unable to find any Connecticut case which directly adjudicates this question. However, we do find clear and, to us, persuasive dicta pertaining to this issue in the case of State v. McNally, 26 Conn. Sup. 174.

In this case the Sentence Review Division of the Superior Court dealt with a situation wherein two men were each sentenced to two life sentences for the crime of murder in the second degree. The sentencing court ordered the sentences to be served consecutively. The petition before the Sentence Review Division requested an order modifying these sentences so that they be served concurrently.

The petition was denied. However, in discussing the period of confinement to which the petitioners were exposed under the judgment of the sentencing Court, the Sentence Review Division noted that:

> "By reason of the court's direction that the mandatory life sentences be served consecutively, these defendants will not be eligible for parole under General Statutes Sec. 54-125 until they have served a minimum of forty years."
> State v. McNally, supra, p. 146.

The provisions of Section 54-125, General Statutes, then provided that a person serving a life sentence is eligible for parole after serving a minimum of twenty years. Thus, in noting that the defendants would be eligible for parole in forty years the Sentence Review Division obviously must have been of the opinion that the fact that the sentences were to be served consecutively did not mean that the first term had to be fully served. This is because there is no way to fully serve a life sentence short of death, or discharge under authority given to your Board and the Board of Pardons under statutes not here applicable.

It is apparent that the Sentence Review Division was of the opinion that for the purposes of obtaining parole eligibility, in terms of so-called parole to the "street", in a consecutive sentence situation, a person need serve only the minimum term on each sentence.

This office reached the same conclusion in our letter to former Commissioner MacDougall dated November 8, 1968, a copy of which is attached hereto.

In this letter we rendered the opinion that a person who had served the minimum term of his sentence, who had been paroled and who had been given a consecutive sentence for a crime committed while on parole, could, under what is now Section 54-128, General Statutes, be reparoled to his second sentence.

In view of the foregoing, it is our opinion that the Board of Parole does have the authority, in the situation wherein a person is subject to a consecutive sentence

to parole that person to that sentence when he has served the minimum term of his first sentence.

In the context of the illustration stated above, this man having served the minimum of his sentence of four years to nine years, is now eligible for parole to his consecutive sentence of one year to three years. After serving the minimum of this latter sentence he will be eligible for parole to the "street".

Very truly yours,

ROBERT K. KILLIAN
ATTORNEY GENERAL

Stephen J. O'Neill
Assistant Attorney General

SJO'N/pcl

Attachment